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No. 85-50

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE P. SHULTZ, SECRETARY OF STATE,
PETITIONER

v.

ALISON PALMER, ET AL.

GEORGE P. SHULTZ, SECRETARY OF STATE,
PETITIONER

v.

MARGUERITE COOPER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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1. Respondents acknowledge that current rates are used in fee awards to compensate for delay in payment (Br. in Opp. 6).[1] They nevertheless insist that the "no-interest rule" (see Pet. 6) has no application here because compensation for delay is a necessary part of a "reasonable attorney's fee" (Br. in Opp. 6-9).

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[1]Respondents also contend that 42 U.S.C. 2000e-5(k) waives the government's sovereign immunity even as to explicit awards of interest (Br. in Opp. 4-5). This contention is addressed in our reply memorandum in *Shaw* v. *Library of Congress*, No. 85-54.

This argument, however, entirely fails to respond to our submission that the "no-interest rule," because grounded on the proposition that "delay or default cannot be attributed to the government" (*United States* v. *Sherman,* 98 U.S. 565, 568 (1878)), bars all claims against the United States that are related to the belated receipt of funds. See Pet. 7. Thus, even if respondents are correct in asserting that the use of current rates in private sector litigation may be characterized as part of a "reasonable fee,"[2] in the absence of an express waiver Congress cannot be deemed to have permitted the enhancement of a money judgment against the United States to compensate for delay in payment.

This is a familiar principle in litigation involving interest. While the term "just compensation" generally is understood to have an interest component (see *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48. 49 (1951)), for example, the Court repeatedly has held that statutes or contracts providing for the payment of "just compensation" do not authorize the award of interest against the United States. See, *e.g., ibid.; United States* v. *Goltra,* 312 U.S. 203, 207-211 (1941). Indeed, respondents' analysis would render the "no-interest rule" nugatory by permitting the delay component of any monetary award against the government to be characterized as a part of the damages rather than as interest.

2. Respondents also suggest that current rates are distinguishable from interest because they are not "add[ed]" to the fee; instead, they are used to "arrive at" a reasonable fee

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[2]The cases cited for this proposition by respondent (Br. in Opp. 8-9) state only that the use of current rates may be an acceptable method of adjusting the fee award for "inflation and interest." *Ramos* v. *Lamm,* 713 F.2d 546, 555 (10th Cir. 1983); *Johnson* v. *University of Alabama,* 706 F.2d 1205, 1210-1211 (11th Cir.), cert. denied, 464 U.S. 994 (1983).

(Br. in Opp. 10). This is so, they maintain, because an attorney embarking on litigation involving fee shifting might set a higher rate in anticipation of delayed payment, and that rate should be used in the calculation of the fee (Br. in Opp. 9-10). As we note in our petition (at 9-10), however, this analysis rests on a fiction. The rate used in calculation of the lodestar is chosen at the completion of the litigation. Any difference between the attorney's historic rate and his lodestar rate therefore represents a retrospective decision to compensate him for delay attributed to the United States—the precise result that is forbidden by the "no-interest rule."

In any event, respondents entirely fail to respond to the proposition (see Pet. 10) that "it is the *reason* why the fee is adjusted upward," rather than the method of adjustment, that is determinative for purposes of the "no-interest rule." *Shaw* v. *Library of Congress,* 747 F.2d 1469, 1474 n.41 (D.C. Cir. 1984) (emphasis in original), petition for cert. pending, No. 85-54. In short, they have offered no reason to believe that there is any relevant difference between an award of interest and the use of current rates.[3]

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be held for disposition in light of *Library of Congress* v. *Shaw,* No. 85-54; alternatively, the petition for a writ of certiorari should be granted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

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[3]In fact, as we note in our petition (at 7 n.6), use of current rates is a decidedly less rational method of compensating for delay in payment. Respondents do not address this point.